

1. Did claimant provide respondent with timely notice of his alleged injuries as is required by K.S.A. 44-520?

2. If claimant failed to provide notice of his accident within 10 days, was there just cause for claimant's failure to so notify respondent?

#### FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the Preliminary Decision should be reversed with regard to whether claimant provided timely notice of accident and this matter remanded to the ALJ for further proceedings consistent with this decision.

Claimant began working for respondent on October 25, 2006, as a delivery driver. Claimant loaded rental equipment on a delivery truck, delivered the equipment and unloaded the equipment at the job site. In the week before Christmas 2006, claimant began having problems with his left shoulder. Claimant began favoring his left side, overworking his right upper extremity when performing his job. Claimant did not tell respondent of these ongoing problems with his left shoulder. Claimant did not testify that his left shoulder continued to worsen up to his last day worked with respondent. However, the February 3, 2007 medical report of Joy Murphy, M.D., claimant's family physician, notes left shoulder pain for a few months.

This was not the first time claimant had experienced problems with his left shoulder. Claimant had sought medical treatment for his left shoulder with Dr. Murphy and Steven Thomsen, M.D., of the Lawrence Family Practice Center in September 2006. At that time, claimant was diagnosed with tendinitis in his left shoulder and prescribed physical therapy. Claimant only completed a portion of the physical therapy sessions. The record indicates claimant's problems with his left shoulder in 2006 resolved before he was hired by respondent.

On February 2, 2007, while delivering propane tanks for respondent, claimant heard a pop and experienced a burning sensation in his right shoulder as he was moving a propane tank. Claimant did not report this accident to respondent on February 2, 2007, and had still not told respondent of the ongoing left shoulder problems which began before Christmas 2006. Claimant did return to respondent on February 5, 2007, the Monday after the alleged accident. He alleges he spoke to both Jeff Gregory, his immediate supervisor, and Cary Barrows, respondent's general manager, about his right shoulder injuries and how they related to his job.

Claimant sought medical treatment with Dr. Murphy on Saturday, February 3, 2007. Dr. Murphy's report of February 3, 2007, notes claimant's ongoing left shoulder pain for a few months and right shoulder pain which "came on gradually, now 2 weeks". Claimant was referred for MRIs of his shoulders on February 9, with the resulting diagnosis indicating claimant had a torn rotator cuff in both the right and left shoulders. Claimant was then referred to orthopedic surgeon Kenneth L. Wertzberger, M.D., for an examination

on February 16, 2007. The history provided Dr. Wertzberger is consistent with that of Dr. Murphy, with neither history describing a specific traumatic incident on February 2, 2007. The history contained in Dr. Wertzberger's report of February 16 does indicate a significant worsening of claimant's pain in his right shoulder after his work day on February 2, 2007. February 2, 2007, is claimant's last day worked with respondent, although claimant did testify at preliminary hearing that he was still an employee of respondent.

The ALJ determined that claimant suffered accidental injuries to his shoulders arising out of and in the course of his employment with respondent. The Preliminary Decision of August 23, 2007, states that it is plain that "the deliveries claimant made for respondent up to February 2nd made a significant contribution to his shoulder problem". However, the Decision does not say shoulders, plural, but instead only seems to discuss a single shoulder. As claimant contends the right shoulder was injured in February 2007, it would appear the ALJ found that shoulder was injured by a series of accidents through February 2.

No discussion of the left shoulder date of accident is contained in this record, except for claimant's testimony regarding problems before Christmas 2006. The E-1, Application for Hearing, filed with the Division of Workers Compensation on May 1, 2007, does allege a series of accidents from October 23, 2006, through February 2, 2007, to both of claimant's shoulders. Claimant does not testify regarding whether his left shoulder worsened through his last day worked.

The ALJ found that claimant failed to provide respondent with timely notice of his accidental injuries as is required by K.S.A. 44-520. The ALJ also discussed the 75-day limit contained in K.S.A. 44-520 regarding whether claimant had just cause for not providing timely notice, but the ALJ failed to reach a decision on that issue.

Claimant contends that he advised both Mr. Gregory and Mr. Barrows about his injuries to his shoulders. Both agree claimant advised them of problems, but deny that claimant told them that his problems were work related. Claimant was provided a cell phone with which to communicate with respondent while he was making his deliveries. From February 5, 2007, through February 16, 2007, the tenth day after claimant's February 2, 2007 alleged accident, claimant made twelve telephone calls to either Mr. Gregory or Mr. Barrows. While some of these phone calls only lasted for one minute, nevertheless, there were significant contacts between claimant and respondent's representatives during the time claimant alleged he provided notice to respondent of his ongoing physical problems from these injuries. And this was during the same time period that claimant was advising Dr. Murphy of his bilateral shoulder problems from his work with respondent, undergoing MRIs to both shoulders, and advising Dr. Wertzberger of his bilateral shoulder problems from his work with respondent. Therefore, this Board Member finds claimant gave notice of accident to respondent on or before February 16, 2007, which was within the 10-day notice requirement.

**PRINCIPLES OF LAW AND ANALYSIS**

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.<sup>1</sup>

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.<sup>2</sup>

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.<sup>3</sup>

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

. . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."<sup>4</sup>

The ALJ, in the Preliminary Decision, found claimant had proven that he suffered injury by accident arising out of and in the course of his employment with respondent to his "shoulder". This is singular, not plural. This is a problem as claimant has alleged injury to both shoulders. Additionally, the Decision does not clarify whether the injured shoulder is the right or the left. However, the ALJ discusses both shoulders in the Decision. Therefore, the ALJ was aware of the bilateral nature of the injury claims alleged by claimant. This Board Member determines the use by the ALJ of the singular rather than the plural was either an oversight or a typographical error. The evidence in this

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<sup>1</sup> K.S.A. 2006 Supp. 44-501 and K.S.A. 2006 Supp. 44-508(g).

<sup>2</sup> *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

<sup>3</sup> K.S.A. 2006 Supp. 44-501(a).

<sup>4</sup> *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

case supports claimant's allegations that he suffered injuries to both shoulders while working for respondent.

K.S.A. 44-520 requires notice be provided to the employer within 10 days of an accident.<sup>5</sup>

K.S.A. 44-520 goes on to say:

The ten-day notice provision provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident . . . .<sup>6</sup>

The next question to be determined is whether claimant provided timely notice to respondent of his injuries. The time limits set forth in K.S.A. 44-520 begin with the date of accident. In order to determine whether notice is timely, the appropriate date of accident must first be determined. With regard to the right shoulder, that determination is simple. Claimant describes a specific incident on February 2, 2007, when his shoulder popped and he felt a burning sensation. Therefore, February 2, 2007, is found to be the date of accident for the right shoulder. The date of accident for the left shoulder is much more complicated.

K.S.A. 2006 Supp. 44-508(d) defines "accident" as,

. . . an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment.<sup>7</sup>

K.S.A. 2006 Supp. 44-508(d) goes on to state,

In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the

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<sup>5</sup> K.S.A. 44-520.

<sup>6</sup> K.S.A. 44-520.

<sup>7</sup> K.S.A. 2006 Supp. 44-508(d).

event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.<sup>8</sup>

At the time claimant was taken off work and provided restrictions by Dr. Murphy and Dr. Wertzberger, neither were authorized to treat claimant. Thus, the first and second criteria set forth in K.S.A. 2006 Supp. 44-508(d) have not been met. While both Dr. Murphy and Dr. Wertzberger diagnosed claimant's problems as work related, and placed those determinations in their respective reports, there is no indication that claimant was provided copies of these writings. Claimant did have many conversations with both Jeff Gregory and Cary Barrows about his ongoing problems, but these conversations were spoken, and not in writing. However, written notice was finally given to respondent by claimant on February 21, 2007. Therefore, pursuant to K.S.A. 2006 Supp. 44-508(d), the date of accident for claimant's left shoulder would be the date written notice of the injury is given to respondent. Here, notice and the date of accident occur on the same date. Therefore, timely notice of accident was provided.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>9</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

### **CONCLUSIONS**

Claimant proved that he suffered accidental injuries arising out of and in the course of his employment with respondent to both his right and left shoulders. Additionally, claimant provided timely notice of the accidents to his shoulders pursuant to K.S.A. 44-520. The Preliminary Decision of the ALJ is affirmed regarding whether claimant suffered accidental injury arising out of and in the course of his employment, but reversed with regard to whether claimant provided timely notice of the accidents.

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<sup>8</sup> K.S.A. 2006 Supp. 44-508(d).

<sup>9</sup> K.S.A. 44-534a.

**DECISION**

**WHEREFORE**, it is the finding, decision, and order of this Appeals Board Member that the Preliminary Decision of Administrative Law Judge Robert H. Foerschler dated August 23, 2007, should be, and is hereby, reversed and the matter remanded to the Administrative Law Judge for additional proceedings consistent with this Order.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of November, 2007.

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BOARD MEMBER

c: Timothy G. Riling, Attorney for Claimant  
J. Stephanie Warmund, Attorney for Respondent and its Insurance Carrier  
Robert H. Foerschler, Administrative Law Judge